Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1541

IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

v.

PROSKAUER ROSE LLP and NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

REPLY BRIEF

RICHARD C. STEIN
210 East 49th Street
New York, NY 10017
(212) 935-1969

FRANK H. PENSKI*
CONSTANCE M. BOLAND
ARTHUR J. ROSNER
NIXON PEABODY LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000

* *Counsel of Record*

Attorneys for Petitioners

174179

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

12 pgs

RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Rule 29.6 Statement	i
Table of Contents	ii
Table of Cited Authorities	iii
Further Reasons for Granting the Writ	1
I. Petitioners' Question Presented To This Court Was Pressed And Passed Upon Below	1
II. Due Process Requires That A Hearing Be Conducted To Determine Whether The Discarded Tapes Were Relevant	3
III. There Is A Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing	4
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

Austral Pacific Fertilizers, Ltd. v. Cooper Industries, Inc.,
Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS
5383 (CA6 March 18, 1997) (unpublished) 5

Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.,
692 F.2d 214 (CA1 1982) 5

Silvestri v. General Motors Corp.,
271 F.3d 583 (CA4 2001) 5

Societe Internationale Pour Participations
Industrielle et Commerciales, S.A. v. Rogers,
357 U.S. 197 (1958) 5

Webb v. Webb,
451 U.S. 493 (1981) 1-2

Yee v. City of Escondido,
503 U.S. 519 (1992) 2

State Cases:

Gordon v. State Farm Insurance Co.,
700 So. 2d 1117 (La. Ct. App. 1997) 6

Graves v. Daley,
526 N.E.2d 679 (Ill. App. Ct. 1988) 6

R.S. Creative, Inc. v. Creative Cotton, Ltd.,
89 Cal. Rptr. 2d 353 (Cal. Ct. App. 1999) 6

Cited Authorities

Page

Smedley v. Raymond Corp.,
No. C035823, 2002 Cal. App. Unpub. LEXIS 462
(Cal. Ct. App. April 29, 2002) 6

Sonmez v. World on Columbus, Inc.,
261 A.D.2d 199 (1st Dep't 1999) 5

Torres v. Matsushita Electric Corp.,
762 So. 2d 1014 (Fla. Dist. Ct. App. 2000) 5

Petitioners submit this reply brief in further support of their Petition for a Writ of Certiorari to review the decision and order of the Appellate Division of the Supreme Court of the State of New York for the First Department (the "First Department"), dated September 7, 2000. Petitioners have properly invoked jurisdiction and have presented an important and timely question implicating due process rights in the context of alleged spoliation of evidence that should be resolved by this Court. Respondents' briefs fail to touch upon the central issue — whether, when spoliation is alleged and relevance is a disputed fact, courts must conduct a hearing to comport with due process.

FURTHER REASONS FOR GRANTING THE WRIT

I. Petitioners' Question Presented To This Court Was Pressed And Passed Upon Below

In their Briefs in Opposition, respondents Proskauer Rose LLP ("Proskauer") and Nomura Securities International, Inc. ("NSI") (collectively, "respondents") assert that this Court lacks jurisdiction to review the decision of the First Department because petitioners allegedly failed to argue below, and the courts failed to consider, that petitioners' due process rights under the Fourteenth Amendment of the United States Constitution were violated. (*See* Proskauer's Respondent's Brief in Opposition ("Proskauer Brief" or "Proskauer Br.") at 7-12; NSI's Brief in Opposition ("NSI Brief" or "NSI Br.") at 3-5.) This position lacks merit. Petitioners requested a hearing, the New York supreme court specifically denied that request, and petitioners reiterated, like a refrain, that they were denied due process throughout their appellate briefs. Thus, the violation of petitioners' due process rights was both repeatedly pressed and passed upon at the state level.

This Court is vested with jurisdiction to review a final judgment of a state court "if the record as a whole shows either

expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). As this Court has clarified:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (citations omitted). Petitioners raised, argued and preserved their due process rights and claims.

In opposing respondents' motion to dismiss due to alleged spoliation, petitioners requested that an evidentiary hearing be conducted if the court found disputed facts and questioned witness credibility. (Record on Appeal of the February 9, 2000 decision and order ("R.") 3787–88.) Ironically, counsel for Proskauer followed suit and also suggested that the court hear testimony. (R. 3793.) The court explicitly refused to conduct a hearing. In its February 9, 2000 decision and order dismissing virtually all of petitioners' claims, the New York supreme court held that "'plaintiffs were not entitled to a fact-finding hearing to determine the nature of the documents they wrongfully discarded.'" (App. 16a.) It is beyond question that the claim was properly presented, and that the supreme court understood the request for a hearing and the implication of its ruling.

Petitioners also sought a hearing and/or asserted that the dismissal of their claims was a denial of due process under the United States Constitution: (1) in the appellate brief to the First Department appealing the February 9, 2000 decision and order

of the New York supreme court (*see* Appellants' Brief, dated March 20, 2000, at 1); (2) in the appellate brief to the First Department appealing the supreme court's subsequent order dated January 29, 2001, which dismissed petitioners' conflict of interest claim against Proskauer (*see* Brief for Plaintiffs-Appellants, dated March 19, 2001, at 4, 6, 32-34, 39, and 40); (3) in petitioners' reply brief submitted to the First Department on the appeal of the January 29, 2001 order (*see* Reply Brief for Plaintiffs-Appellants, dated April 27, 2001, at 23-25); (4) in petitioners' motion for leave to appeal submitted to the New York Court of Appeals on May 11, 2001 (*see* Motion of Plaintiffs-Appellants for Leave to Appeal to the Court of Appeals, dated May 11, 2001, at 14, 24, 25 n.16, and 27-28); and (5) in petitioners' motion for leave to appeal submitted to the New York Court of Appeals on November 9, 2001. (*See* Motion of Plaintiffs-Appellants for Leave to Appeal to the Court of Appeals, dated November 9, 2001, at 18, 29-31.)

Thus, the centerpiece of respondents' opposition — that petitioners failed to raise their due process claims — is contradicted by the record.

II. Due Process Requires That A Hearing Be Conducted To Determine Whether The Discarded Tapes Were Relevant

In their briefs, respondents repeatedly state that petitioners willfully destroyed relevant evidence that they were obligated to produce, (Proskauer Br. at 3; NSI Br. at 1-2), thereby mischaracterizing the principal issue in this case. That tapes were intentionally discarded has never been the issue. Indeed, petitioner Melvyn Kaufman wrote and told Proskauer that he discarded tapes immediately after he did so. (R. 56-67.) However, it has consistently been petitioners' contention that those discarded tapes contained conversations that were wholly *irrelevant* and unrelated to the instant action. There is no evidence in the record that, once litigation was contemplated,

any tape containing a relevant conversation was discarded. No hearing was held on this issue. The disputed fact, which is a threshold issue, is whether the discarded information was *relevant*. Petitioners seek an evidentiary hearing on that issue. The legal question presented to this Court is whether the New York courts, by denying petitioners a hearing on whether *relevant* evidence was discarded, deprived petitioners of rudimentary due process.

Respondents' distortion of this fundamental issue is elucidated by a comparison of statements in respondents' briefs. Respondents refer to petitioners' "admitted destruction of relevant evidence" (Proskauer Br. at 5; *see also* NSI Brief at 2), and later in their briefs discuss the adverse inference relied on by the New York courts. (Proskauer Br. at 14; NSI Br. at 6.) Had petitioners "admitted" that they destroyed "relevant evidence," there would have been no need for the New York courts to extend the adverse inference impermissibly to infer that the discarded tapes were relevant. (App. at 8a and 16a.) The New York courts improperly resorted to the adverse inference because, in fact, there was not a scintilla of evidence that the discarded tapes were relevant.

The record makes plain that petitioners adamantly and consistently denied that the tapes were relevant. Due process requires an evidentiary hearing to determine whether those tapes were, or were not, relevant.

III. There Is A Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing

Contending that the case law petitioners cite lacks discussion of any constitutional issue, respondents argue that there is no conflict of authority regarding when due process requires an evidentiary hearing to resolve disputed facts raised on motions to dismiss due to alleged spoliation. (Proskauer Br. at 13-14; NSI Br. at 5-6.) Respondents misstate the law. Disputed

material facts must be resolved by the fact-finder following a hearing or trial to comport with due process. As this Court has held, "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale Pour Participations Industrielle et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958). Disputed facts as to whether spoliation occurred should be no exception to this rule. Yet, in determining disputed facts on spoliation motions, some courts have conducted hearings, as due process requires, and, in similar circumstances, other courts have declined to conduct hearings, in violation of due process. *Compare Austral Pacific Fertilizers, Ltd. v. Cooper Industries, Inc.*, Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS 5383, at *6-12 (CA6 March 18, 1997) (unpublished), *with Torres v. Matsushita Electric Corp.*, 762 So. 2d 1014, 1015-16 (Fla. Dist. Ct. App. 2000); *see also* Petition for a Writ of Certiorari, II.A.

As illustrated by case law, a genuine conflict of authority exists. *See* Petition for a Writ of Certiorari, II.A. One circuit court of appeals has upheld an order dismissing plaintiff's claims due to spoliation of evidence where no evidentiary hearing was conducted to resolve disputed issues of fact, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 588-89, 595 (CA4 2001), while another circuit court of appeals afforded a hearing to determine disputed facts prior to dismissal. *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 216-20 (CA1 1982) (Breyer, J.).

This same inconsistent application of due process rights with respect to requiring a fact-finding hearing is found at the state level, as well. Numerous state courts have dismissed causes of action, even where disputed issues of fact were raised, without conducting an evidentiary hearing. *See Torres*, 762 So. 2d at 1015-16, 1018; *Sonmez v. World on Columbus, Inc.*, 261 A.D.2d 199, 199 (1st Dep't 1999); *see also* cases cited in Petition for

Writ of Certiorari, at 17-18. At the same time, other state courts, finding similar facts, have conducted hearings or submitted the disputed facts to the jury. *See Smedley v. Raymond Corp.*, No. C035823, 2002 Cal. App. Unpub. LEXIS 462, *3-4 (Cal. Ct. App. April 29, 2002); *Gordon v. State Farm Insurance Co.*, 700 So. 2d 1117, 1119-20 (La. Ct. App. 1997); *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 89 Cal. Rptr. 2d 353, 360 (Cal. Ct. App. 1999); *Graves v. Daley*, 526 N.E.2d 679, 680 (Ill. App. Ct. 1988); *see also* cases cited in the Petition for a Writ of Certiorari, at 18.

The courts' uneven treatment of a litigant's due process rights on a motion to dismiss for alleged spoliation of evidence renders this issue ripe for review by this Court.

CONCLUSION

For these additional reasons, and because respondents have failed to rebut or adequately address the arguments raised, petitioners submit that this Court should grant a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department to address the important question concerning what constitutes due process when disputed facts regarding relevance are raised on a motion to dismiss due to alleged spoliation of evidence.

Respectfully submitted,

FRANK H. PENSKI*
CONSTANCE M. BOLAND
ARTHUR J. ROSNER
NIXON PEABODY LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000

RICHARD C. STEIN
210 East 49th Street
New York, NY 10017
(212) 935-1969

Attorneys for Petitioners

* *Counsel of Record*

New York, New York
May 28, 2002